In an order dated September 3, 1958 (Appendix B, *infra*, pp. 33–34), the district court overruled this motion on the ground that it was "without jurisdiction to grant the relief prayed for and [had] no jurisdiction of the subject matter of said motion."

From this order the United States perfected an appeal to the Supreme Court of Kansas.[2] In that court the Government pointed out that the redemption provisions of 28 U.S.C. 2410(c) and Kansas General Statutes, 1949, § 60–3440, are in direct conflict with each other. It contended that its redemption rights in this litigation must therefore be determined by the federal rather than the state statute, in accordance with the supremacy clause of Article VI of United States Constitution (Abs. 44, R. 9, Appendix A, *infra*, p. 27).

On July 10, 1959, the Supreme Court of Kansas affirmed the judgment of the district court (R. 12–24). The Supreme Court held, first, that the Government's motion had properly raised the question of its right to redeem under 28 U.S.C. 2410(c). In this connection, the Supreme Court determined that the district court, despite its statement that it was without "jurisdition" over the motion, had in fact assumed jurisdic-

[2] The United States filed its notice of appeal to that court on October 30, 1958. On January 14, 1959, just before the expiration of the one-year period within which, under Kansas General Statutes, 1949, § 60-3440, the mortgagors' right to redeem was exclusive, the mortgagors redeemed the property and the clerk of the district court issued a certificate of redemption to them (Appendix A, *infra*, p. 21).

tion and had overruled the Government's motion on its merits (Appendix A, *infra*, pp. 23–24).[3]

Second, the Supreme Court ruled that the Government's redemption rights in this litigation are governed by state law rather than the redemption provision in 28 U.S.C. 2410(c). This decision was based on two federal court decisions[4] which were read as authority for the proposition that "there is nothing in 28 U.S.C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *" (Appendix A, *infra*, pp. 30–31). The court also quoted portions of the Government's mortgage which it thought relevant, and concluded (Appendix A, *infra*, p. 32):

> Considering the terms of the government's mortgage which bound both it and the mort-

[3] Appellees Hetzel argued in both the district court and the Supreme Court that the Government's motion sought a modification of the foreclosure decree and that, under the Kansas rule that a judgment may not be modified after the term in which it is entered, the motion was untimely. In rejecting this contention, the Supreme Court concluded that the district court had not purported to determine the relative redemption rights of the parties when it issued its original foreclosure decree. For this reason, the court held that the motion did not ask for a modification of the decree and that the rule concerning the alteration of judgments was inapplicable (Appendix A, *infra*, pp. 22–23).

This determination of Kansas law by the highest court of the state is final and there is, therefore, no issue before this Court as to the jurisdiction of the courts below to entertain the Government's motion on its merits. *Murdock* v. *City of Memphis*, 20 Wall. 590.

[4] *United States* v. *Cless*, 150 F. Supp. 687 (M.D. Pa.), affirmed, 254 F. 2d 590 (C.A. 3), and *United States* v. *Ryan*, 124 F. Supp. 1 (D. Minn.). See *infra*, pp. 11–13.

> gagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, * * * we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption * * *.

THE QUESTION IS SUBSTANTIAL

This case is closely related to *United States* v. *Brosnan,* No. 137, and *United States* v. *Bank of America National Trust & Savings Assn.,* No. 183, both pending before this Court on writs of certiorari granted on October 12, 1959. In fact, the decision of the Supreme Court of Kansas in this case is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *Bank of America.* See *infra,* p. 11.

The issue in each of these actions concerns the Government's rights as a junior lienholder where the senior lienor initiates proceedings to foreclose his lien. *Brosnan* and *Bank of America* present the question of whether a junior federal tax lien may be extinguished in a proceeding to which the United States is not joined as a party, under a state procedure which does not require the joinder of junior lienors in formal judicial proceedings. The present case raises an issue of comparable importance, *i.e.,* whether, in circumstances where the Government *is* joined in a judicial action under the waiver of sovereign immunity contained in 28 U.S.C. 2410, conflicting provisions of state law take precedence over rights given the United States by the federal statute.

No. 565 18

In the Supreme Court of the United States

OCTOBER TERM, 1959

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., GEORGE HETZEL AND GRACE MARIE HETZEL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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I. In 28 U.S.C. 2410, Congress has given the consent of the United States to be "named a party in any civil action or suit * * * in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." This consent is expressly made subject to "the conditions prescribed in this section * * * for the protection of the United States * * *." One of these conditions is that (28 U.S.C. 2410(c)):

> Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

In this action, the United States was made a party defendant under the provisions of Section 2410 (Abs. 21), in its capacity as a second mortgagee of the subject real estate. A foreclosure sale was held to satisfy the first mortgagee's prior lien. The United States thereupon became vested, by the express terms of the federal statute, with a right to redeem the property during the prescribed one-year period.

In asserting this right to redeem in the courts below, the Government drew into question the validity of Kansas General Statutes, 1949, § 60-3440, on the ground of its being repugnant to the laws of the United States. That section provides that—

> For the first twelve months after [the sheriff's] sale, the right of the defendant owner to redeem is exclusive * * *.

It is apparent that this statute, insofar as it purports to give a mortgagor the *exclusive* right to redeem within the one-year period, is in square conflict with Section 2410(c). Under the supremacy clause of the Federal Constitution, Art. VI, cl. 2, such a conflict must be resolved in favor of the federal enactment. We accordingly argued below that the exclusivity provision of the state statute is unconstitutional as against the Federal Government, whose right of redemption must be considered "coexistent with that accorded the defendant owner by Section 60–3440, General Statutes of Kansas, 1949 * * *" (Abs. 34).

In the face of this contention, the Supreme Court of Kansas held Section 60–3440 to be fully applicable in this litigation. Its decision is, therefore, one "in favor of [the] validity" of a challenged state statute and falls directly within the appeal jurisdiction of this Court under 28 U.S.C. 1257(2). See cases cited, *supra*, p. 2.

2. This Court has long held that "[s]uits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States*, 303 U.S. 36, 41; *Nichols* v. *United States*, 7 Wall. 122, 126. Congress employed this principle when it enacted Section 2410, by qualifying its consent to suit with certain conditions "for the protection of the United States," including the requirement that the United States be given a redemption period of one year following the date of a foreclosure sale. As expressly indicated by the legislative history of this statute, Congress intended the

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Government's right of redemption to be effective regardless of any contrary provisions of state law." H. Rept. No. 2722, 71st Cong., 3rd Sess., p. 4.

The Court of Appeals for the Ninth Circuit gave recognition to this legislative intention in *United States* v. *Bank of America National Trust & Savings Assn., supra.* It stated (265 F. 2d 862, 868):

> In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, *the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.* [Emphasis added.]

To the same effect, see *First National Bank and Trust Co.* v. *Mac Garvie*, 22 N.J. 539.

In contrast to *Bank of America*, the decision of the Supreme Court of Kansas in the present case repudiates this clear statutory language and purpose. The court was wrong in concluding that "there is nothing in 28 U.S.C. § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens * * *." (Appendix A, *infra*, pp. 30–31.)

The two federal decisions cited by the court (Appendix A, *infra*, pp. 27–30) provide no support for this holding. Indeed, *United States* v. *Cless*, 254

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

No opinion was rendered by the District Court of Edwards County, Kansas. The opinion of the Supreme Court of Kansas (Appendix A, *infra*, pp. 18–32) is reported at 185 Kan. 274, 341 P. 2d 1002.

JURISDICTION

The judgment involved in this appeal was entered in a foreclosure suit in which the United States, as holder of a second mortgage, was named as a party defendant pursuant to 28 U.S.C. 2410. After a judgment of foreclosure and a sheriff's sale, the United States attempted to redeem the property pur-

suant to 28 U.S.C. 2410(c). The Supreme Court of Kansas upheld the exclusive right of the mortgagor to redeem for a period of a year following the sale under a provision of Kansas law (G.S. 1949, § 60-3440) which the United States claimed was repugnant to the federal statute. Thus, the case involved a judgment by the highest court of a state in a case where the validity of a state statute was drawn in question as being repugnant to a law of the United States and the decision was made in favor of its validity. This Court, therefore, has jurisdiction under 28 U.S.C. 1257(2). *International Union of United Automobile Workers* v. *O'Brien*, 339 U.S. 454; *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767.

STATUTES INVOLVED

The pertinent statutes, 28 U.S.C. 2410 and Kansas General Statutes, 1949, § 60-3439, § 60-3440, are set forth in Appendix C, *infra*, pp. 35–37.

QUESTION PRESENTED

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

STATEMENT

The John Hancock Mutual Life Insurance Company originated this foreclosure action on September 3, 1957, by filing its petition against George and Grace Marie Hetzel, mortgagors, and numerous other potential claimants of interests in the property involved, including the United States (Abs. 2–12).[1] Process was duly served on the United States, in the manner prescribed by the waiver of sovereign immunity contained in 28 U.S.C. 2410 (Abs. 21).

The Insurance Company alleged that it held the Hetzels' note for $25,000, secured by a mortgage constituting a first lien on certain Kansas real estate, on which the mortgagors were in default. It sought a money judgment and asked that its mortgage be adjudged a first lien superior to any interests claimed by any of the defendants, that the mortgage be foreclosed, and that the property be sold to satisfy plaintiff's claim (Abs. 10–12).

In its answer and cross-petition, the United States asserted that the Farmers' Home Administration held four separate promissory notes, three having been executed by both mortgagors and one by George Hetzel alone, on which a total of $12,944.83, with interest, was due. One of these notes, in the face amount of $10,565, was alleged to be secured by a second mortgage on the same property (Abs. 13–14). The Government acknowledged the priority of the

[1] "Abs." refers to the printed Abstract of Appellant, in the Supreme Court of Kansas, which appears at page 1 of the transcript of record in this Court; "R." refers to the transcript of record in this Court.

Insurance Company's mortgage but prayed that the total amount of its claims be adjudged a second lien, inferior only to the Insurance Company's.

On December 4, 1957, the state district court granted judgment to the Insurance Company for $26,944.78, with interest and costs, and to the United States for (1) $10,402.61, with interest and costs, on the note secured by the mortgage, and (2) a total of $2,642.39, with interest, on the other notes. Holding that the Insurance Company's and the Goyernment's mortgages constituted first and second liens, respectively, the court ordered both to be foreclosed (Abs. 29–30).

A sheriff's sale was held on January 22, 1958, at which the Insurance Company bought in the property for the amount of its own judgment (Appendix A, *infra*, p. 19). The United States did not bid at the sale. By order of the district court the sale was confirmed on February 5, 1958, and the sheriff was directed to issue a certificate of sale to the purchaser, "fixing the period of redemption at eighteen months from the date of sale" (Abs. 33). The court further ordered that, if redemption was not made within that time, the sheriff should execute and deliver a deed conveying title to the property, free and clear of all claims of the defendants, to the holder of the certificate of sale (Abs. 33–34).

On June 5, 1958—approximately four and one-half months after the date of the sheriff's sale—the United States attempted to redeem the property, pursuant to the authority of 28 U.S.C. 2410(c), by submitting an affidavit and tendering the appropriate sum of re-

demption money to the clerk of the district court, in accordance with the procedure prescribed by Kansas General Statutes, 1949, § 60–3451 (Abs. 34–36). This tender was not accepted and the clerk declined to issue a certificate of redemption in return therefor (Appendix A, *infra*, pp. 19–20).

The United States thereupon filed a motion for an order directing the clerk to issue to it a certificate of redemption, alleging that it had made a proper tender of redemption money to the clerk. The Governme .t based its entitlement to redeem on 28 U.S.C. 2410(c), which provides in relevant part that

> * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. * * *

It was asserted that this provision takes precedence over § 60–3440 of the Kansas General Statutes, 1949, which stipulates that "[f]or the first twelve months after such sale, the right of the defendant owner to redeem is *exclusive* * * *" (emphasis added). Specifically, the Government's motion stated that (Abs. 34):

> * * * The provisions of Title 28, United States Code, Section, 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60–3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

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which section is appended hereto. This request was declined by the clerk and in a letter dated July 8, 1958, the district court, in brief, informed the government that the holder of the certificate of purchase and the mortgagors questioned the government's right to redeem the real property at that time and consequently the clerk would not issue the redemption certificate until the court so ordered. The letter further stated that the court would be on vacation until September but it presumed the government would want to file a motion raising the question and would serve opposing counsel and have the motion set for hearing.

On July 23, 1958, the government filed its motion seeking an order of the district court directing the clerk to issue a certificate of redemption to it, alleging that:

> "(a) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60–3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.
>
> "(b) The provisions of Title 28, United States Code, Section 2410(c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60–3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein."

Another portion of the motion contained the affidavit referred to in (a) above.

On September 3, 1958, during a hearing on the government's motion, the mortgagors contended the trial court was without jurisdiction to grant the relief sought in the government's motion. The trial court

so found and in its order overruling the motion on the same day stated:

> "* * * this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion."

The government timely perfected the instant appeal from the above order and raises two questions.

1. Did the trial court err in denying the government's motion made on the ground that 28 U.S.C. 2410(c) accords the government a coexistent redemption right with that of the mortgagors under G.S. 1949, 60-3440?

2. Did the trial court have jurisdiction over the subject matter of the motion and to grant the relief prayed for?

On January 14, 1959, the mortgagors redeemed the property and were issued a certificate of redemption by the clerk of the court.

As is customary, we will proceed to the determination of the jurisdictional question, if one there be, before reaching the first question raised by the government.

The foreclosure decree entered on Decembr 4, 1957, and the order of confirmation of sheriff's sale on February 5, 1958, occurred during the term of court beginning on the fourth Monday of October, 1957, the next term began on the second Monday of February, 1958, and the government's request of the court clerk for a redemption certificate made on June 5, 1958, was in the term of that court which began on the first Monday of May, 1958. The motion, as above stated, was filed on July 23, 1958, which means that two terms of court in the thirty-third judicial district including Edwards county (G.S. 1949, 20-1029a) had expired from the time of the trial court's decree and

order on December 4, 1947, and the government's demand on the court clerk and motion addressed to the trial court on July 23, 1958.

The mortgagors contend that a trial court loses jurisdiction over its judgment after the expiration of the term in which a judgment is rendered absent the exceptions provided for in G.S. 1949, 60–3007, which are not present here. The contention is too far-reaching. The controlling rule of law as to jurisdiction after term was stated in *Keys* v. *Smallwood*, 152 Kan. 115, 102 P. 2d 1001.

> "Rule followed that a judgment cannot be set aside, modified or in anywise affected after the term at which it is rendered except as provided by the civil code." (Syl. ¶ 1.)

However, the Keys case was a garnishment proceeding and is not applicable in our present case.

Other authorities cited by the mortgagors are somewhat similar to the overall picture presented by our present case but they are distinguishable as to the question under consideration and, therefore, are not determinative thereof.

The government calls our attention to *Johnson* v. *Wear*, 110 Kan. 237 Pac. 141, wherein (p. 243) *Mitchell* v. *Insley*, 33 Kan. 654, 657, 7 Pac. 201, was cited. The Mitchell case involved an original ejectment action where a deed was determined to constitute a mortgage to secure a payment of $2,000 and the mortgagee had a lien upon the land but it was further determined his remedy was not by ejectment. Subsequently the mortgagee filed a mortgage foreclosure suit wherein the amount due under the mortgage was in issue. (p. 658.) The court stated that the amount due on the mortgage in the ejectment action was wholly immaterial, that the adjudication the deed was a mortgage was conclusive, and perhaps that *some-*

thing was due, but not the amount. The question of the amount due, therefore, remained undetermined. Justice Marshall in the Johnson case (p. 243) quoted the following language from page 657 of the Mitchell case:

> " 'It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment.' "

The Mitchell case was also cited in *Landon* v. *Clark,* 221 Fed. 841, 845.

The only provision of the decree of foreclosure pertaining to redemption reads:

> "* * * and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided * * *."

By reason of the foregoing, the trial court obviously did not fully determine the redemption rights of the mortgagors as against the government, or *vice versa,* except by the general language of the phrase, "* * * as is by law in such cases made and provided." The redemption rights of the mortgagors under our state statutes (G.S. 1949, 60–3440, *et seq.*) were therefore covered as were also the government's redemption rights under 28 U.S.C. § 2410. Expressed in another way, the trial court, by using the language quoted above, of necessity ruled that all questions regarding the redemption of the real property here involved would be governed by both state and federal law.

We believe the trial court intended to subject the redemption questions to both state and federal law

and that it made clear such intention when ruling on the government's motion by use of the following language:

> "Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled."

What other possible construction can be given this order? The motion was neither dismissed nor stricken, but was ruled upon, and in view of what has herein been said and the authorities relied on by the government in support of its contention that the trial court did have jurisdiction of the subject matter, we can only conclude the trial court had, and exercised, authority to determine the rights of redemption "as is by law in such cases made and provided," as well as the power to grant or deny the relief prayed for in the motion by the government.

Determination of the second question requires that we set out a part of the mortgage executed by the mortgagors to the government. The form contained the following heading:

> "United States Department of Agriculture
> "Farmers Home Administration
> "REAL ESTATE MORTGAGE FOR KANSAS
> "Special Livestock Loan"

Section 21 of the mortgage contained these provisions:

> "THAT TIME IS OF THE ESSENCE of this mortgage and of the note * * * AND SHOULD DEFAULT be made in the payment of the note secured hereby, or any installment due under said note * * * or if for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized and empowered * * * (1) to inspect and repair said property * * *

(2) to declare the entire indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy for it by law provided; PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, whether herein set out or conferred by law. * * *".

Section 22 in part provided:

"That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof. * * *"

Section 23 in pertinent part reads:

"That; should this said property be sold under foreclosure (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger: (2) Mortgagor will pay all costs * * * (3) Mortgagor does hereby expressly waive, *to the extent permitted by law* the benefits of all homestead, dower, exemption valuation, appraisement, stay and moratorium *laws of the State of Kansas* now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption." (Our emphasis.)

The mortgagors base their contentions primarily on G.S. 1949, 60-3440 as follows:

"For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall

F. 2d 590 (C.A. 3), may even be read as looking in the opposite direction. There, the United States had not in fact been joined in the first mortgagee's previous foreclosure action and the question was whether the Government's junior mortgage lien could have been extinguished by the sale in that action. The Court of Appeals for the Third Circuit held that it was so extinguished, since joinder was unnecessary under the relevant state law. The Third Circuit viewed the standing of inferior federal liens as being controlled exclusively by state law, and concluded that joinder of the United States under 28 U.S.C. 2410 is required only "[i]n states where it is necessary to join junior lienors * * *." 254 F. 2d at 593.

In the present foreclosure action, however, the United States was in fact joined under Section 2410. Moreover, unlike the state law determined to be applicable in *Cless*, under Kansas law a junior lien holder is a necessary party to a first mortgagee's foreclosure action. *Stacey* v. *Tucker*, 123 Kan. 137; *Motor Equipment Co.* v. *Winters*, 146 Kan. 127; and see *Garber* v. *Bankers' Mortgage Co.*, 27 F. 2d 609, 610 (D. Kan.). Thus, application of the interpretation given to 28 U.S.C. 2410 by the Third Court in *Cless* could be said to require that the provisions of that statute be given full effect in this litigation.[5]

[5] The Government does not concur in the Third Circuit's reasoning in *Cless*, which that court again followed in *United States* v. *Brosnan*, *supra*. It is our position, which we are advancing before this Court in *Brosnan* and *Bank of America*, that no federal lien may be extinguished without a judicial proceeding to which the United States is made a party in the manner prescribed by federal law.

United States v. *Ryan*, 124 F. Supp. 1 (D. Minn.), the other federal decision cited below, is likewise not helpful in the present context. That case concerned the issue of whether the United States had recorded a tax lien in accordance with state recording statutes. Further, that case has been overruled by the Eighth Circuit in *United States* v. *Rasmuson*, 253 F. 2d 944, 946.

Nor is there merit to the implication in the opinion of the Supreme Court of Kansas that the Government in its mortgage contract agreed to be bound by state law despite the redemption provision of Section 2410 (c). See Appendix A, *infra*, pp. 24–25, 32. While it is true that the mortgage is entitled "Real Estate Mortgage for Kansas," and that the "laws of the State of Kansas" are referred to in paragraph 23 thereof, the instrument also stipulates "that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power or remedy of Mortgagee, *whether herein set out or conferred by law* * * *" (R. 4, 6, 7; emphasis added). The designation of the contract as a "Kansas" mortgage and the reference to state law in paragraph 23 are, therefore, not to be construed as an adoption of any provision of state law in conflict with "the federal policy to protect the treasury and to promote the security of federal investment * * *" which is expressed in Section 2410(c). *United States* v. *View Crest Garden Apts.*, 268 F. 2d 380, 383 (C.A. 9), certiorari denied, November 9, 1959, U.S. Sup. Ct. No. 372, this Term.

3. As previously noted, this Court has granted both the Government's petition for a writ of certiorari in *United States* v. *Brosnan*, No. 137, this Term, and the bank's petition, in which the Government acquiesced, in *United States* v. *Bank of America National Trust & Savings Assn.*, No. 183, this Term. These cases involve the question of whether a junior federal tax lien may be extinguished in a proceeding to which the United States is not made a party in the manner prescribed by federal law. We are there contending that any proceeding purporting to affect an inferior federal lien is a "suit against the United States," which may only be maintained in accordance with the conditions prescribed by Congress. *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282.

If the decision in this case is allowed to stand, however, the necessity of joining the United States as a party—the issue in *Brosnan* and *Bank of America*—will become of less importance to the Government. For the Supreme Court of Kansas has held that, even where the United States as a junior lienor *is* a necessary party under state law and *is* joined pursuant to a congressional waiver of immunity, the conditions imposed upon that waiver may be ignored if they conflict with state law. Under this decision, the importance of joinder is reduced since in any event the federal security may be divested without reference to the restrictions enacted by Congress "for the protection of the United States."

The enforceability of inferior federal liens, in accordance with the terms specified by Congress, is of

real concern to the Federal Government. The Court has recognized the importance of the problem with respect to the administration of the tax laws by granting certiorari in *Brosnan* and *Bank of America*. The standing of such liens is of equally vital significance in the administration of the Government's vast lending and financial assistance programs.[6]

The effect of the decision below is to require the United States, "[w]here a sale of real estate is made to satisfy a lien prior to that of the United States,"[7] to bid at the foreclosure sale or risk losing its security altogether. In Kansas, for example, redemption by the mortgagor[8] within the one-year period in which his right to redeem is supposedly exclusive cuts off the redemption right of junior creditors and completely extinguishes the interest of these creditors in the property. *Frazier* v. *Ford*, 138 Kan. 661; *McFall* v. *Ford*, 133 Kan. 593, rehearing denied, 133 Kan. 678, certiorari denied, 285 U.S. 537; *Sigler* v. *Phares*, 105 Kan. 116. The Kansas court's decision in this case would, if followed elsewhere, work a similarly drastic result in jurisdictions with comparable

[6] We are advised by the Department of Agriculture that the Farmers' Home Administration alone has made or insured presently outstanding loans of more than $120,000,000, which are secured by second mortgages or junior liens on real estate. This security was all taken pursuant to specific statutory authorization, *e.g.*, the Bankhead-Jones Farm Tenant Act, 7 U.S.C. 1003 (farm ownership loan program), 1007 (operating loan program); 42 U.S.C. 1472(b)(1) (farm housing loan program); 16 U.S.C. 590r, *et seq.* (water conservation loan program); 12 U.S.C. 1148a–1, 2, 4 (other emergency loans).

[7] 28 U.S.C. 2410(c).

[8] See *supra*, p. 6, n. 2.

redemption statutes [9] or in the numerous states where there is no provision in force permitting redemption after sale. See Tiffany, *Real Property* (3d Ed., 1939), § 1530.

The legislative history of Section 2410 [10] indicates that Congress initially considered the alternatives of permitting the Government to bid at a foreclosure sale and to redeem. As passed by the Senate, the original bill contained a provision designed to permit delay of a judicial sale so that the Government might obtain a congressional appropriation to enable it to bid at the sale. See S. Rept. No. 351, 71st Cong., 2d Sess., pp. 1–2. This provision was stricken by the Conference Committee, and the redemption provision which is now contained in Section 2410(c) was substituted.

In rejecting the Senate-proposed method of protecting the rights of the United States as a junior lien holder, the Conference Committee concluded that a federal redemption provision—even if it conflicted with and thus frustrated state redemption limitations—was a more adequate method for protecting those rights. H. Rept. No. 2722, 71st Cong., 3d Sess., p. 4. It thus recognized the necessity for the Government to have a reasonable time after the sale, *i.e.*, one year, in which to take steps for the preservation of its interest.

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[9] *E.g.*, Iowa Code Ann., § 628.3; Wyoming Stat. 1957, § 1–480.

[10] 28 U.S.C. 2410 was first enacted by the Act of March 4, 1931, 46 Stat. 1528. It has since been reenacted with slight changes not relevant here.

CONCLUSION

The question presented is of substantial importance, and this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
WILLIAM A. MONTGOMERY,
Attorneys.

DECEMBER 1959.

APPENDIX A

[In the Supreme Court of the State of Kansas]

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET. AL., APPELLEES, AND THE UNITED STATES OF AMERICA, APPELLANT

* * * * *

Appeal from Edwards district court; LORIN T. PETERS, judge. Opinion filed July 10, 1959. Affirmed.

The opinion of the court was delivered by—

ROBB, J.: The John Hancock Mutual Life Insurance Company, hereafter referred to as the insurance company, on September 3, 1957, filed the original suit herein to recover judgment on its note and foreclose its first mortgage lien on real property in Edwards county belonging to George Hetzel and Grace Marie Hetzel, hereafter referred to as mortgagors, who had executed a note and mortgage as security therefor. Another defendant and the appellant here, the United States of America, hereafter referred to as the government, is also holder of notes and a second mortgage, as security for one of the notes, executed by the same mortgagors on the same real property. In this appeal we are not concerned with other defendants of record or their claims. No dispute exists as to the priority of the mortgages nor as to the pleadings and we shall therefore refer only to the pertinent parts thereof

as we proceed with our discussion of the points at issue.

On December 4, 1957, the trial court entered judgment on the respective notes and foreclosed the first mortgage in favor of the insurance company and the second mortgage in favor of the government. The decree further provided that if the mortgagors failed to pay the judgments within ten days, the sheriff of Edwards county was directed to advertise and sell the real property according to law subject to redemption for a period of eighteen months after the date of sale. The proceeds were to be applied on costs, taxes, on the first lien of the insurance company and then on the government's second lien.

The mortgagors failed to pay within ten days and on January 22, 1958, the sheriff's sale was held. The only bidder was the insurance company which bid the property in for the full amount of its judgment, interest, taxes and costs. The government did not bid at the sheriff's sale. The insurance company was the only party who appeared to move for the court's confirmation order of the sheriff's sale. On February [illegible], 1958, the trial court confirmed the sale and directed the sheriff to issue to the purchaser a certificate of sale for the real property, fixing the period of redemption at eighteen months from the date of sale. If redemption were not made within time, the sheriff was directed to make, execute and deliver to the holder of said certificate his sheriff's deed to the real property and put the holder thereof in possession.

On June 5, 1958, the government requested the district court clerk to issue a certificate of redemption to it pursuant to its tender under G.S. 1949, 60-3451. The amount thereof was to be measured by the *lex rei sitae* (normal state-law rule) to effectuate its right to redeem the property under 28 U.S.C. 2410(c),

George Hetzel, finds that this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion.

Now therefore, it is by the court considered, ordered, adjudged and decreed that said motion be and hereby is overruled.

/s/ LORIN T. PETERS,
Judge.

APPENDIX C

1. 28 U.S.C. 2410 provides as follows:

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale

to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

2. The pertinent provisions of the Kansas General Statutes, 1949, are as follows:

> § 60–3439. * * * The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, as provided for in this act, at any time within eighteen months from the day of sale * * *.
>
> § 60–3440. * * * For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within fifteen months from the date of sale. * * *

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not be deemed such a lien as to entitle the holder to redeem."

The government places its reliance on 28 U.S.C. § 2410, which is hereto appended in full, but more particularly it relies on subsection (c) thereof, as follows:

> "Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem."

Mortgagors referred to other statutes involving redemption. Some of them are of little, if any, help in the determination of this appeal. Briefly stated, those that are pertinent here provide that after the issuance of the certificate to the purchaser at the sheriff's sale (G.S. 1949, 60–3438), the mortgagors could redeem the real property at any time within eighteen months from the day of sale (60–3439); for the first twelve months after the day of sale the mortgagors had the exclusive right to redeem but if at the end of that time they had not done so, any lien creditor could redeem within fifteen months from the date of sale (60–3440); after the expiration of the fifteen months, the mortgagors could still redeem at any time before the end of the eighteen months, but the creditors could not. (60–3447.) The mortgagors could assign or transfer their rights of redemption whereby those same rights would pass to an assignee or transferee. (60–3455.) See *Union Central Life Ins. Co.* v. *Reser,* 134 Kan. 876, 8 P. 2d 366, for further discussion of some of our redemption statutes.

The sovereign immunity of the government from suit without the express mandate of the Congress to the contrary, by waiver or granting permission for such suit or suits, is of sufficient general knowledge

that a full legal discussion thereof would be surplusage.

Neither can there be any argument with the government's contention that federal laws are supreme over state laws where a conflict exists between them such as occurred in an action in a state court to recover statutory penalties for violation of the emergency price control act. (*Testa* v. *Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. ed. 967.) The same is true where there were labor disputes involving interstate or foreign commerce. (*Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. ed. 638.)

The Supreme Court of the United States has not been hesitant in cases involving diversity of citizenship to remand them for determination by the federal circuit court under state laws. For example, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1189, was an action concerning tort liability and involved application of state laws by the federal circuit court.

In *United States* v. *Ryan*, 124 F. Supp. 1, the Minnesota Torrens system as it related to the filing of federal tax liens was comprehensibly explained and it was held that the government failed to comply with the procedural requirements of the state law whereby its lien for taxes was lost. We cannot repeat all that was said in the Ryan case, as to do so would unduly extend this opinion, but the following statements therefrom are of significant consequence herein:

> "The United States is not exempt from the provisions of the state statutes. The laws of the United States definitely provide that the tax lien here asserted will not become a valid lien unless notice thereof is filed as by state law prescribed. A state law affecting the title to property must be followed, and is binding upon the United States." (p. 10.)

"At any time, however, up to the time of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, the plaintiff could have perfected its lien by filing the notice as by statute required. The foreclosure of the mortgage and the expiration of the period of redemption has now precluded plaintiff from so doing. The mortgage contained a power of sale. Under the laws of the State of Minnesota, a mortgage containing a power of sale may be foreclosed by advertisement. There is nothing in the United States Code which precludes a foreclosure by advertisement. 28 U.S.C.A. § 2410 provides that in any action to foreclose a mortgage the United States *may* be joined as a party defendant. But there is nothing in this section, or in any section of the United States Code, which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. The Minnesota Federal Savings and Loan Association was entitled to foreclosure by advertisement, and the plaintiff, and all other parties interested in the property, is bound by the foreclosure. This exact question was before the Court in the case of Trust Co. of Texas v. United States, D.C., 3 F. Supp. 683, and the Court held that a mortgage foreclosure under power of sale extinguishes not only the rights of the owner in the property sold, but all subsequent and inferior liens thereon, *including the lien of the United States.* Therefore, in the instant case, the foreclosure divested the interest of the registered owner, Kenneth Ryan, and the rights of all parties claiming under or through him, including the plaintiff here." (pp. 10–11.)

A case more analogous to our present one is *United States v. Cless*, 150 F. Supp. 687, where a first mortgagee had obtained a writ of *fieri facias* and later bid in and purchased the mortgaged property at the

sheriff's sale. He then sold the property to another but title had not yet passed. The government was seeking foreclosure of its second mortgage and the question was whether the second mortgage lien was divested by the sheriff's sale in the light of 28 U.S.C. § 2410. In rendering summary judgment against the government, the district court there said:

> "At the time the agency [the government] made this loan and entered its mortgage it had notice that its mortgage was second in lien to a first mortgage held by an individual entered over a year prior thereto.
>
> "The mortgagors defaulted on their first mortgage. The mortgagee foreclosed and bought in the property at the Sheriff's sale on his bid of the costs of the sale. Had the second mortgagee been an individual there is no question but that the lien of the second mortgagee would have been extinguished by the foreclosure on the first mortgage. Is the situation changed because the United States happens to be the second mortgage holder?
>
> "The Government leans heavily on 28 U.S.C. § 2410(a), above cited. This statute is not mandatory—merely waives sovereign immunity in suits to foreclose mortgages or quiet titles. *Haldeman* v. *United States,* D.C.E.D. Mich., 93 F. Supp. 889. In other words, the purpose of this statute in which the United States consents to be named a party in an action which seeks an adjudication touching any mortgage or other lien of the United States is merely to waive sovereign immunity from suit in certain types of cases. *Wells* v. *Long,* 9 Cir., 162 F. 2d 842.
>
> "If the United States is entitled to a priority in this case it must be based on some statutory enactment. * * * the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States." (pp. 689-690.)

The court therein further stated:

> "I find no evidence of a Congressional sensitivity in relation to claims of the Government predicated on loans made to individuals by various governmental agencies comparable to that evidenced in relation to tax claims, and for the very obvious reason that the latter deals, as above indicated, with a matter of public policy—the collection of taxes to enable the Government to function. Certainly what was said in the Ryan case, *supra,* is pertinent in connection with the problem presented in this case concerning the lien of the United States under a second mortgage created in the course of an ordinary business transaction of an agency of the United States, as to which there is no federal statutory provision conferring any particular sanctity, and which, therefore, is dependent entirely both as to its position and enforcement upon State laws." (p. 692.)

The Cless case was appealed by the government and appears as *United States* v. *Cless,* 254 F. 2d 590, where the circuit court affirmed the lower court and stated:

> "We find nothing in the statute giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference." (p. 593.)

In the same opinion it is further stated:

> "In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor." (p. 594.)

In view of the language in the above federal court decisions to the effect that there is nothing in 28

U.S.C., § 2410, giving the government rights that are superior or preferential to the rights enjoyed by private citizens, we are unable to see that the government in this appeal has made it affirmatively appear that its substantial rights have been prejudiced. In its answer in the original foreclosure proceedings, the government, under 28 U.S.C., § 2410, could have asked for preferential or superior rights of redemption over those of the mortgagors, or at the time the trial court entered its judgment of foreclosures the government could have sought to have its redemption rights determined, and finally, had the trial court, in view of the decisions of the federal courts, refused to grant such preferential or superior rights, the government still had the authority and power to bid at the sheriff's sale, which would have fully protected it. The government admits that it had the authority and power to bid at the sheriff's sale the same as any private citizen in its position. The federal farm mortgage corporation was holder of a second mortgage under circumstances identical with those in our present case in *Federal Land Bank* v. *Ludwig,* 157 Kan. 657, 143 P. 2d 784. The mortgage corporation appealed from an adverse decision of the court below. This court set out the pertinent statutes (pp. 659–660) and in reversing the trial court, substantially stated what has just been said above in respect to the government's right to redeem. (pp. 660–661.)

In *United States* v. *Jungels,* 167 Kan. 482, 207 P. 2d 402, the government filed a claim on notes which had been barred by the five year statute of limitation for a long time—but less than twenty years. The evidence showed that during his lifetime the deceased maker had been solvent so far as non-exempt personal, real, and mixed property was concerned. The trial court's instructions were that the jury could consider all this

in determining "that it is more likely that these notes have been paid than that they have not," (p. 484) and in affirming the verdict and judgment against the government, this court set out the controlling rules of evidence and concluded:

> "While the statutes of limitation and nonclaim do not run against the United States when suing in its sovereign capacity it is well established that when the United States brings an action for money it is governed by the rules of evidence just as any litigant." (pp. 487–488.)

Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U.S.C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, and the points emphasized in the foregoing discussion, we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption irrespective of the reasons given or those that may be inferred from the journal entry of judgment.

Affirmed.

APPENDIX B

In the District Court of Edwards County, Kansas

No. 6758

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A CORPORATION, PLAINTIFF

vs.

GEORGE HETZEL, ET AL., DEFENDANTS

JOURNAL ENTRY

Now on this 3rd day of September, 1958, the same being an adjourned day of the regular May, 1958, term of said Court, the above entitled cause comes on to the court for hearing on the motion of the United States of America for an order directing the clerk of said court to issue to it a certificate of redemption for the real estate heretofore sold in the above entitled action on mortgage foreclosure sale. The United States of America is present by E. Edward Johnson, Assistant United States Attorney for the District of Kansas; the defendant, George Hetzel, is present by his attorneys, John A. Etling and W. N. Beezley, of Kinsley, Kansas.

And now the United States of America, by and through its said Attorney waives oral argument on its part and submits said motion on its written brief filed herein. And now counsel for the defendant, George Hetzel, are heard orally on said motion, and the court having considered the written brief filed herein on behalf of the United States of America, and having heard the argument of said counsel for the defendant,